Supreme Court, U. S.
FILED
DEC 31 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1033

WEBBS FABULOUS PHARMACIES, INC., AND ECKERD'S OF COLLEGE PARK, INC., *et al.*,
Appellants,

vs.

ARTHUR H. BECKWITH, JR., CLERK OF THE CIRCUIT COURT AND SEMINOLE COUNTY, FLORIDA,
Appellees.

AN APPEAL FROM THE
SUPREME COURT OF THE STATE OF FLORIDA

JURISDICTIONAL STATEMENT

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IN THE

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OCTOBER TERM, 1979

No.

WEBBS FABULOUS PHARMACIES, INC., AND ECKERD'S OF COLLEGE PARK, INC., *et al.*,
Appellants,

VS.

ARTHUR H. BECKWITH, JR., CLERK OF THE CIRCUIT COURT AND SEMINOLE COUNTY, FLORIDA,
Appellees.

AN APPEAL FROM THE
SUPREME COURT OF THE STATE OF FLORIDA

JURISDICTIONAL STATEMENT

INTRODUCTION

Appellant appeals from the final order and judgment of the Supreme Court of Florida entered October 4, 1979, denying appellant's Motion for Rehearing, and thereby affirming such Supreme Court's decision of May 31, 1979, upholding the constitutionality of Florida Statute §28.33. In holding such statute valid, the Supreme Court of Florida reversed a decision of the trial court which had declared the same to be unconstitutional. This case therefore raises the question of whether or not the retention by government of *all income* earned upon monies deposited at interest in a Court registry (and pursuant to a

Court order) constitutes a taking of property without due process of law and in violation of equal protection precepts. The retention of all interest herein is *in addition* to a statutory fee charged against the principal sum. Thus, this case challenges the validity of Florida Statute §28.33 which mandates that such interest be thus retained. Appellant also asserts the statute improperly impinges upon an exclusively judicial function through legislative fiat.

OPINIONS BELOW

This case followed a direct line of appeal from the Circuit (trial) Court in and for Seminole County, Florida, to the Supreme Court of Florida. The trial court's original order (Appendix A) provided only that interest earned on funds deposited in the court registry belonged ultimately to the parties determined to be entitled to the principal sum. Subsequently, before the state appellate proceedings were perfected, the trial court amplified this opinion with the addition of language to its opinion (Appendix B), amending the original order nunc pro tunc, as follows:

> Ordered and adjudged that Florida Statute §28.33 and Laws of Florida, Chapter 73-282 [essentially one in the same] are unconstitutional to the extent that the provisions thereof pertain to private monies held in the registry of the court in pending litigation and specifically to those monies held in the registry of the court in this case.

The Florida Supreme Court subsequently reached a contrary conclusion declaring "There is no unconstitutional taking" in its decision reported at 374 So2d 951 (Appendix C). One Florida Justice, concurring in part and dissenting in part, commented "the assertion that the retention of the

interest by the county is an unconstitutional interference with the judicial process has merit." Nonetheless, rehearing by the Supreme Court of Florida was denied, as also reported at 374 So2d 951 (Appendix C). Notice of Appeal to this Court was filed in Florida's Supreme Court on December 12, 1979. (Appendix D).

GROUNDS UPON WHICH JURISDICTION IS INVOKED

This case is fundamentally a United States Constitution 5th and 14th Amendment challenge of a lengthy state statute which provides in pertinent part as follows:

> Moneys deposited in the registry of the court shall be deposited in interest-bearing certificates . . . All interest accruing from monies deposited shall be deemed income of the office of the clerk of the circuit court. . . §28.33 Official Florida Statutes, 1977, at page 162. (For unabridged text of this statute please see Appendix E).

Appellant argues the appropriation of interest earned on private monies held in the court registry is a denial of due process, a taking without just compensation violative of equal protection precepts and an act legislatively mandated in violation of the separation of powers doctrine. Appellant also asserts the statute creates an unconstitutional tax upon use of and access to the Courts.

This court has jurisdiction hereof pursuant to 28 U.S.C.A. §1257 (2). It has commented previously in similar cases, holding that fees and emoluments collected by a Clerk of Court and deposited at interest are not public monies. *United States v. MacMillan,* 40 Sup.Ct. 540, 253 U.S. 195, 64 L.ed. 857 (1920). See also *United States v. Mason,* 31 Sup. Ct. 28, 218 U.S. 517, 54 L.ed.

1133 (1910). Since Florida prescribes an additional statutory fee for utilization of the court registry, payable out of the principal sum when it is first deposited into the registry, this argument is especially compelling. (See §28.24, Official Florida Statutes, 1977, at page 160).

It is an abrogation of the rights of a citizen of the United States to place a tax upon use of and access to the Courts, such use and access being an implicit right of citizenship.

While under the law of Florida a small fee for the use of the court registry may validly be imposed, retention of all interest earned on private monies can only be deemed a tax since the exaction is a forced contribution to meet the public needs of government and is not a charge reasonably related to the cost of services rendered in return. *Flood v. State ex rel. Homeland Co.,* 117 So. 385 (Sup.Ct. Fla., 1928). Furthermore, this last stated principle antedates even our United States Constitution. As the Florida Supreme Court itself said in *Flood,* supra, quoting from *Malin v. LaMoure County,* 145 N.W. 582 (Sup.Ct. N.D., 1916):

> We realize that the clause of the Magna Charta . . . which we have paraphrased . . . into 'All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay,' has generally been construed . . . against the selling of justice . . . in other words, that a free and reasonable access to the courts and to the privileges accorded by the courts, and without unreasonable charges, was intended to be guaranteed to every one. *Flood,* at 387.

It is thus clearly for this court to determine if the tax as here applied to appellants in fact affects constitutional rights. *Storaasli v. State of Minn.*, 51 Sup.Ct. 354, 283 U.S. 57, 75 L.ed. 839 (1931). Further, no matter how the state court may characterize the charges imposed on use of the court registry, the United States Supreme Court is not bound by the guises into which state courts may cast a tax. *St. Louis Cotton Compress Co. v. Arkansas,* 43 Sup.Ct. 125, 260 U.S. 346, 67 L.ed 297 (1922). See also *Allegeyer v. Louisiana,* 17 Sup.Ct. 427, 165 U.S. 578, 41 L.ed 832 (1897). To permit the courts to function as tax collectors would reduce them to a subordinate branch of government. *Ex parte Coffelt,* 228 P.2d 199. (Crim. Ct. App. Okla., 1951).

Citizens of the United States are guaranteed a republican form of government. U.S. Constitution, Art. IV, § 4. Thus, the separation of powers between the legislative branch and the judicial branch of state government which is mandated under the Florida State Constitution at Article II, §3 is similarly protected under Federal Law. The doctrine of separation of powers is an inherent and integral element of the republican form of government. As such, it is expressly guaranteed to the states and their citizens by the national government. [See *VanSickle v. Shanahan,* 511 P.2d 223, (Sup.Ct. Kan., 1973) wherein this Court's decisions under Article IV, §4 of the U.S. Constitution are analyzed at length.] Where legislative authority presumes, in effect, to tax utilization of the court registry and to regulate the terms and conditions upon which the courts may administer their own registry departments, the concept of republican government is jeopardized.

It has been held true repeatedly that the taking of all interest earned upon private funds deposited in a court

registry is a taking without just compensation and thus an inherent denial of due process and equal protection of the laws guaranteed to citizens of the United States under both the 5th and 14th Amendments of the United States Constitution. Citing federal constitutional principles, the highest state courts throughout this land have time after time deferred to what they declare to be compelling due process and equal protection requirements, concluding that interest earned upon a sum deposited in a trial court's registry is property of the owner of the principal and not of any department of government. *Sellers v. Harris County,* 483 S.W.2d 242 (Sup.Ct. Tex., 1972), *Bordy v. Smith et al.,* 34 N.W.2d 331 (Sup.Ct. Neb., 1948), *State v. McFetridge,* 54 N.W. 1 (Sup.Ct. Wisc., 1893). See also *Myles Salt Co. v. Board of Commissioners,* 239 U.S. 478, 36 Sup.Ct. 204, 60 L.ed. 392 (1916) where it is observed that the contention a state law as administered and justified by the highest court of the state violates the Federal Constitution presents a federal question.

That significant federal questions are squarely raised in proceedings such as these is clear to the highest state courts. They have almost unanimously concluded that to permit interest on registry funds to accrue to the account of government is wrong because "*The result is untenable so long as private property is constitutionally protected.*" *Sellers,* supra at 243 (emphasis added). To like effect it has also been said:

> The earnings on the fund are a mere incident of ownership of the fund itself. The constitutional provision. . . that no person shall be deprived of his property 'by law of the land,' applies to the earnings in the same manner and with the same force as it applies to principal. *McMillan v. Robeson County,* 137 S.E.2d, 105 at 108 (Sup.Ct. N.C., 1964).

The North Carolina view is rightfully the law of the land. *University of South Carolina v. Elliott,* 149 S.E.2d 433 (Sup.Ct. S.C., 1966) *Ostley v. Saper,* 305 P.2d 946 (2d DCA Cal., 1957); *Water District v. Adams,* 197 P.2d 543 (Sup.Ct. Cal., 1948); *Board of Law Library Trustees of Los Angeles v. Lowery,* 154 P.2d 719 (Ct. of App. Calif., 1945); *Kierman v. Cleland,* 273 P. 938 (Sup.Ct. Idaho, 1929); *Pomona City District v. Payne,* 50 P.2d 822 (C.A. Calif., 1935); *Drainage Dist. No. 2 of Ada Cty. v. Ada Cty.,* 226 P. 290 (Sup.Ct. Idaho, 1924); *Lawson v. Baker,* 220 S.W. 260 (Ct. Civ. App. Tex., 1920, error ref'd.)

QUESTION PRESENTED BY THIS APPEAL

The following question is presented by this appeal:

> Does a state statute providing that all interest monies earned upon funds held in the registry of the court automatically become county monies violate the Fifth and Fourteenth Amendments to the United States Constitution, as well as Article IV, §4 thereof?

In such connection it should be reiterated that the retention of all interest is a charge made in addition to a statutory fee paid from the principal sum. Thus, in Florida where funds are deposited into the court registry, less is ultimately paid out of the registry than is initially placed in it, no matter how large an income said funds may produce.

STATEMENT OF THE CASE

This is an interpleader action brought pursuant to Chapter 676, Florida Statutes.

In February, 1976, Eckerd's purchased most of the assets of Webb's Pharmacies. At "closing" Webb's debts appeared greater than the purchase price. Therefore, pursuant to the Bulk Sales Act (Chapter 676, Official Florida Statutes, 1977) Eckerd's (as Plaintiff below), paid the purchase money proceeds into the Circuit Court Registry pursuant to an Interpleader Complaint.

Prior to ordering the Interpleader fund paid into its Registry, the Court learned the Clerk claimed entitlement to all interest which might be earned thereon in addition to a statutory fee of one (1%) percent on the first $500.00 and one-half (1/2%) percent of the balance of all funds placed with the clerk. These statutory one percent and one-half percent charges, collected pursuant to Section 28.24, Official Florida Statutes, supra, are not at issue here except insofar as their very existence enhances Appellant's arguments.

The trial court therefore entered a Final Order of Interpleader on June 15, 1976, which was thereafter supplemented under date of July 12, 1976, by an Order which states in pertinent part:

> . . . The Court reserves ruling over the issue of whether the interest earned on the fund invested by the Clerk . . . shall accrue to the benefit of the Clerk's office or to the benefit of the creditors of Webb's Fabulous Pharmacies, and the transfer to and investment by the Clerk . . . shall be wholly without prejudice to the claim of the creditors to the earnings from the invested funds and the Clerk of the Circuit Court shall not, by reason of

> the receipt of said funds or the earnings thereon, have any greater claim thereto than before such receipt. (Appendix F)

The principal sum delivered to the Clerk was One Million Eight Hundred Forty Five Thousand Two Hundred Forty Seven and 77/100 ($1,845,247.77) Dollars. The sum of interest earned thereon and now in issue here exceeds One Hundred Thousand and no/100 ($100,000.00) Dollars.

In part because of the present and then incipient controversy, and also for other substantial reasons not pertinent here, a Receiver was later appointed to hold the principal sum and to invest the same at interest for the creditors hereto. Following his appointment, the Receiver raised the constitutional issues discussed herein repeatedly and directly to the trial court. Following a decision favorable to the Receiver by the trial court, the Clerk successfully appealed to the Florida Supreme Court. The Receiver now brings this appeal.

The Clerk still holds the accrued and compounding interest which is at issue here.

REASONS WHY QUESTIONS PRESENTED ARE SUBSTANTIAL

The reasons why the questions presented by this appeal are substantial are obvious. Plenary consideration, with briefs on the merits and oral argument is clearly necessary. Among the compelling reasons this matter needs consideration on the merits are:

> (a) While this Court has considered issues similar to the ones raised here in the past, it has been nearly 60 years since issues akin to these have been deliberated here.

(b) This Court has never considered the exact issue raised on this appeal.

(c) The retention of interest earned on private monies held in a court registry is a taking of property without due process of law and a denial of the law's equal protection; at issue is an outright expropriation of private property by legislative fiat.

(d) The taking of property mandated by the challenged statute is a legislative invasion into the sole province of the judiciary, violative of the guarantee of a republican form of government.

(e) The challenged statute constitutes an unconstitutional tax and charge upon the administration of justice and access to the Courts; it is impossible for appellants to utilize the judicial process under the facts of this case without paying the State the $100,000 plus tariff demanded.

That these are all substantial constitutional issues under our Federal Constitution is clear from the series of state appellate court decisions previously cited. An ample line of cases holds statutes like the one challenged constitutionally infirm. Such issues are well within the ambit of this tribunal. *United States v. Morgan,* 59 Sup.Ct. 795, 307 U.S. 183, 83 L.ed. 1211 (1939); *United States v. MacMillan,* supra; *United States v. Mason,* supra, *Florida v. Anderson,* 91 U.S. 683, 23 L.ed. 458 (1876). Since a rule of reason is ultimately the basic law of our land, it is for this Supreme Court to determine whether an asserted right guaranteed to all citizens of these United States is denied by the laws of any state. *Angel v. Bullington,* 67 Sup.Ct. 657, 330 U.S. 183, 91 L.ed. 832 (1946); *Pollock v. Williams,* 64 Sup.Ct. 792, 322 U.S. 4, 88 L.ed 1095 (1944).

CONCLUSION

It is submitted that the Supreme Court of the United States has jurisdiction of this appeal. Further, should this Court determine this appeal to have been taken improvidently, it is respectfully requested that these papers be treated as a Petition for Writ of Certiorari pursuant to 28 U.S.C.A. §2103.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned counsel for Appellant in the cause above captioned, and a member of the Bar of the United States Supreme Court, hereby certify and state that all parties required to be served with the foregoing Jurisdictional Statement have been served in accordance with the Supreme Court Rules.

HARVEY M. ALPER, ESQUIRE

APPENDIX A

IN THE CIRCUIT COURT IN AND FOR THE EIGHTEENTH JUDICIAL CIRCUIT, SEMINOLE COUNTY, FLORIDA

CIVIL ACTION NO. 76-354-CA-17-EE

ECKERD'S OF COLLEGE PARK, INC.,

Plaintiffs,

vs.

WEBB'S FABULOUS PHARMACIES, INC., et al.,

Defendants.

_____/

ORDER

This cause came on to be heard on the Receiver's First Amended Motion for Direction to Clerk to Remit Certain Monies to Receiver (Record, Page 1134), together with Receiver's Memorandum in Support of Receiver's First Amended Motion for Direction to Clerk to Remit Certain Monies to Receiver (Record, Page 1223), Errata Sheet to Receiver's Memorandum in Support of Receiver's First Amended Motion for Direction to Clerk to Remit Certain Monies to Receiver (Record, page 1225); Memorandum in Opposition to Receiver's First Amended Motion for Direction to Clerk to Remit Certain Monies to Receiver (Record, Page 1251), and Receiver's Memorandum in Reply to Memorandum in Opposition to Receiver's First Amended Motion for Direction to Clerk to Remit Certain Monies to Receiver (Record, Page 1262). Having carefully considered said Motion, Memoranda, and Errata the Court finds and it is accordingly

ORDERED AND ADJUDGED that the Clerk of this Court is not entitled to any interest earned, accrued or received on monies deposited in the registry of this Court pursuant to the Court's order recorded July 12, 1976 in Official Records Book 1091, Page 0494, of the Public Records of Seminole County, Florida; the creditors herein are the rightful parties entitled to all such interest earned on the interpleader fund while it is held by the Clerk of this Court. It is further

ORDERED AND ADJUDGED that having determined only those issues listed in Paragraphs c. and 3. of the Limited Order of Recusal entered June 20, 1978, and the Order of Reassignment entered by the Chief Judge June 26, 1978, the undersigned hereby defers to the Honorable Dominick J. Salfi, the Judge regularly assigned to this case, determination of whether to grant the aforementioned Receiver's First Amended Motion for Direction to the Clerk to Remit Certain Monies to Receiver.

DONE AND ORDERED in Chambers at Sanford, Seminole County, Florida, this 24th day of July, 1978.

/s/ KENNETH M. LEFFLER
CIRCUIT JUDGE

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APPENDIX B

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR SEMINOLE COUNTY, FLORIDA.

CASE NO. 76-354-CA-17-EE

ECKERD'S OF COLLEGE PARK, INC.,

Plaintiff,

v.

WEBB'S FABULOUS PHARMACIES, INC., ET AL.,

Defendants.

_____/

ORDER

THIS CAUSE having come on to be heard on August 23, 1978, on the Receiver's Motion for Nunc Pro Tunc Order Correcting Omission from the Record and the Court being fully advised in the premises, finds, as follows:

1. Pursuant to Florida Rule of Civil Procedure 1.540(a) and Florida Appellate Rule 9.130(f), this Court has jurisdiction pending appeal to amplify its Order, dated July 24, 1978, by setting forth the grounds upon which such Order was based. It is particularly incumbent upon this Court to do so in light of the constitutional issues raised herein which may be determinative of the proper appellate forum for the pending appeal.

2. The Order, dated July 24, 1978, and entered by the undersigned Judge, is amended nunc pro tunc by the addition of the following language:

ORDERED and ADJUDGED that Florida Statutes § 28.33 and Laws of Florida, Chapter 73-282 are unconstitutional to the extent that the provisions thereof pertain to private monies held in the registry of the court in pending litigation and specifically to those monies held in the registry of the court in this case.

DONE and ORDERED in Chambers at the Courthouse in Sanford, Florida, this 23d day of August, A.D., 1978.

/s/ Kenneth M. Leffler
CIRCUIT JUDGE

CERTIFICATE OF JUDGE'S SECRETARY

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to all those individuals on the attached Schedule "A" this 23d day of August, A.D., 1978.

/s/ Sharon Tucker
Secretary to Circuit Judge

Approved as to form:

/s/ Harvey M. Alper
HARVEY M. ALPER,
RECEIVER

/s/ Harry A. Stewart
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APPENDIX C

Arthur H. BECKWITH, Jr., Clerk of the Circuit Court, etc., Appellants,

v.

WEBB'S FABULOUS PHARMACIES, INC., et al., Appellees.

No. 55213.

Supreme Court of Florida

May 31, 1979

Rehearing Denied Oct. 4, 1979.

Harry A. Stewart, Sanford, for appellants.

Harvey M. Alper and William H. Wack, of Law Offices of Alper & Wack, Altamonte Springs, for appellees and Harvey M. Alper as receiver, in pro per.

PER CURIAM.

The constitutionality of section 28.33, Florida Statutes (1977), which provides that interest accruing on funds in the registry of the court shall be deemed income of the Office of the Clerk of the Circuit Court, is before the court.[1]

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[1] § 28.33 Fla.Stat. (1977), reads in pertinent part:

> Moneys deposited in the registry of the court shall be deposited in interest-bearing certificates at the discretion of the clerk, subject to the above guidelines . . . All interest accruing from moneys deposited shall be deemed income of the office of the clerk of the circuit court investing such moneys and shall be deposited in the same accounts as are other fees and commissions of the clerk's office. Each clerk shall, as soon as is practicable after the end of the fiscal year, report to the county governing authority the total interest earned or all investments during the preceding year.

We hold the statute constitutional. Art. V, § 3(b)(1), Fla.Const.

Eckerd's of College Park, Inc. (Eckerd's) entered into an agreement with Webb's Fabulous Pharmacies, Inc. (Webb's) to purchase Webb's assets. Eckerd's, pursuant to statutory authority, filed an interpleader action against Webb's and its creditors, tendering the purchase price of $1,812,145.77. The court appointed a receiver to determine the number and amount of claims filed against these funds and to establish accounts for the deposit of the funds.

On Eckerd's motion, the trial court ordered that the purchase price be deposited in the registry of the court. The court also ordered the clerk to deposit the funds in "an assignable interest bearing account at the highest rate of interest." The court reserved ruling on whether the interest earned on the money would accrue to the court's clerk's office. The clerk followed the court's order. The receiver filed a motion seeking to obtain the interest earned on the money in the sum of $91,474.71. In an order granting the receiver's motion, the trial court held section 28.33, Florida Statutes (1977), unconstitutional to the extent it applied to these "private" monies. The clerk appealed to the Fourth District Court of Appeal and that court transferred the case to this court.

It is the receiver's position (apparently adopted by the trial court), that it is constitutionally inconsistent to have funds held by a receiver and invested by him to result in earnings to the prevailing party, yet funds held by the clerk of the circuit court earning interest to be kept for the general treasury. The statute is also unconstitutional, says the receiver, because it violates section 57.051, Florida

Statutes (1977),[2] and constitutes either a taking without due process of law or an unlawful tax.

[1,2] We begin our analysis by reviewing rules of law so well established as not to require citation. It is not this court's responsibility to determine the wisdom of legislative acts, nor is it the court's function to strike down legislative schemes because we would have fashioned different plans for achieving the desired results. We must begin with the presumption that the act is constitutional, and it is to be upheld unless a specific provision of the state or federal constitution is clearly violated.

Inherent in the trial judge's ruling is a finding that interest earned is the private property of the person ultimately receiving the principal. This proposition rests on the underlying premise that the principal remains private when deposited in the clerk's registry. Neither the premise nor the conclusion withstands close analysis.

[3] Section 28.33 does two things: (1) it authorizes the clerk to invest money in the registry of the court in order to earn interest; and (2) it dictates the disposition of the interest earned. Without this statute, the clerk would have no authority to invest money held in the registry of the court. It is the statute itself which gives the authority to the clerk and outlines the method of disposition.

The notion that title to the interest flows from title to the principal is erroneous. As all other funds in that account, these funds are considered "public money" from the time they are deposited in the general registry of the

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[2] § 57.051, Fla.Stat. (1977), reads in pertinent part:

> (1) PROHIBITION. – No officer shall make two charges for the same official act or service, nor charge for any constructive service. No fee shall be charged for any official service performed or claimed to be performed by any officer unless the fee is specifically authorized and its amount is specified by law.

court to the time they leave the account. *See Money v. State ex rel. Florida First National Bank,* 206 So.2d 436 (Fla. 1st DCA 1968); § 219.01(2), Fla.Stat. (1977).

[4] The receiver states that the interest retained by the clerk of court is either a fee or a tax. It is neither. The statute permits the state to retain only the amount representing interest earned on funds invested by the clerk, a function of the clerk expressly created by the statute. Interest accrues only because of section 28.33. In this sense, the statute takes only what it creates. Failure to recognize this fact would result in the erroneous holding that the clerk is required to pay interest on all funds on deposit with the registry of the court.

[5] It is irrelevant that had these funds been initially held by a receiver, the interest earned would have accrued to the party receiving the principal. In that event, judicial discretion would have been exercised and the legislature, under our separation of powers doctrine, could not effect a change in the court's order. Art. II, § 3, Fla.Const. The legislature has the right, however, to decide that funds held by a public officer in a public account accrue to the benefit of all of the people.

[6] There is no unconstitutional taking because interest earned on the clerk of the circuit court's registry account is not private property.

[7] The rule announced today shall apply in this case and in all cases where deposits of funds are made after the effective date of this opinion.

Accordingly, the order of the trial judge is reversed, the statute is held to be constitutional, and the case is remanded to the trial court for further action consistent with this opinion.

It is so ordered.

ENGLAND, C.J., and ADKINS, BOYD, SUNDBERG, HATCHETT and ALDERMAN, JJ., concur.

OVERTON, J., concurs in part and dissents in part with an opinion.

OVERTON, Justice, concurring in part, dissenting in part.

I agree that the subject statute is constitutional but only if it is construed as directory rather than mandatory. In my opinion, the trial judge must have the discretionary authority to direct the disposition of the interest earned on funds placed in the registry of the court pursuant to a court proceeding. To hold otherwise allows the legislative branch to improperly interfere with the resolution of a judicial matter.

In my opinion, in order for the statute to be constitutional, the trial court must continue to retain its inherent discretionary authority to direct disposition of the interest earned on funds placed in the registry as part of a court action. Without such authority, the assertion that the retention of the interest by the county is an unconstitutional interference with the judicial process has merit. The clerk receives a fee separate from the interest for acting as a depository, so the interest cannot be considered as a service charge. Section 28.33, Florida Statutes (1977), concerns the investment of all county funds held by the clerk, not just funds in the court registry. Moneys deposited in the "registry of the court" are funds which are strictly and directly controlled by the court. This control is exclusively a judicial function. Allowing the clerk the discretion to earn interest on those funds without any judicial control results in a surcharge on the use of the justice system, and can neither be justified nor allowed if the courts are to be

"open to every person for redress of any injury." Art. I, § 21, Fla.Const. In the instant case, the mandatory price tag for the use of the justice system, under the majority opinion, is $91,474.71. The impropriety of such a charge is even more egregious when we consider the fact that there are statutes which require the interpleading of funds into the registry of the court. *See, e.g.*, § 676.106, Fla.Stat. (1977) [Uniform Commercial Code].

I would uphold the constitutionality of the statute and construe the part relating to court registry funds as directory, allowing the trial judge to affirmatively direct the disposition of interest earned. If there were no such affirmative judicial action, the interest earned would be disposed of in acccordance with the statutory provision.

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF FLORIDA

ARTHUR H. BECKWITH, JR., Clerk of the Circuit Court and Seminole County, Florida, Appellants, v. WEBB'S FABULOUS PHARMACIES, INC., and ECKERD'S OF COLLEGE PARK, INC., et al., Appellees.	CASE NO. 55,213 (Appeal From the Circuit Court, Seminole County, Florida, Transferred from District Court of Appeal, Fourth District, Pursuant to Florida Appellate Rule 9.040(b), etc.; Transferred to Supreme Court September 14, 1978

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY given that Webb's Fabulous Pharmacies, Inc., and Eckerd's of College Park, Inc., et al., appellees above named, hereby appeal to the Supreme Court of the United States from the final order of the Supreme Court of the State of Florida entered herein on October 4, 1979, denying rehearing on a "per curium" decision of such Court (with opinion) entered May 31, 1979, affirming the retention by appellants of interest earned upon private funds deposited in the registry of the Circuit Court registry of appellants in and for Seminole County,. Florida.

THIS APPEAL IS taken pursuant to 28 USC 1257(2).

Respectfully submitted this 12th day of December, 1979.

BY: /s/ Harvey M. Alper
HARVEY M. ALPER, ESQUIRE
MASSEY, ALPER, WACK & EATON
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305/834-8111

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies hereof have been furnished by depositing the same in a United States post office or mailbox, with first class postage prepaid and with airmail postage thereon prepaid as may be required by the rules of the Supreme Court of the United States to the Supreme Court of Florida and copies hereof to Harry Stewart, Esquire, as County Attorney, Seminole County Courthouse, North Park Avenue, Sanford, Florida 32771; Robert H. Roth, Esquire, as Class Representative, 1180 Hartford Building, Orlando, Florida 32801; and to all other parties listed on the attached Schedule A, this 12th day of December, 1979.

/s/ Harvey M. Alper
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APPENDIX E

28.33 Investment of county funds.—The Clerk of the Circuit Court in each county shall make an estimate of his projected financial needs for the county and shall invest any funds in designated depository banks in interest-bearing certificates or in any direct obligations of the United States in compliance with federal laws relating to receipt of and withdrawal of deposits. All investments shall be open for bid to all qualified depositories in the county. The clerk shall select the highest and best bid for deposit. All bids received by the clerk shall include, but not be limited to, the interest rate to be earned and the total amount of dollar return to be paid to the clerk. In the event of a like bid between two or more banks, the moneys shall be divided and deposited in each bank, so long as the total interest income from the divided deposits will not be less than the total interest income had the deposits not been divided. If at the time of bid the dollar return on direct obligations of the Federal Government is greater than the highest bank return, then the clerk shall invest in the higher return security. Moneys deposited in the registry of the court shall be deposited in interest-bearing certificates at the discretion of the clerk, subject to the above guidelines. No clerk investing such funds shall be liable for the loss of any interest when circumstances require the withdrawal of funds placed in a time deposit and needed for immediate payment of county obligations. In any county where local banks refuse to bid on securing such money on interest-bearing certificates, the clerk may request and receive bids from banks in other counties within the state and make such deposits to the successful bidder. All interest accruing from moneys deposited shall be deemed income of the office of the clerk of the circuit court investing such moneys and shall be deposited in the

same accounts as are other fees and commissions of the clerk's office. Each clerk shall, as soon as is practicable after the end of the fiscal year, report to the county governing authority the total interest earned on all investments during the preceding year.

APPENDIX F

IN THE CIRCUIT COURT, EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR SEMINOLE COUNTY, FLORIDA

CASE NO: 76-354-CA-17-EE

ECKERD'S OF COLLEGE PARK, INC.

Plaintiff,

vs.

WEBB'S FABULOUS PHARMACIES, INC., et al.,

Defendants,

ORDER

This cause came on to be heard upon the motion of the plaintiff, Eckerd's of College Park, Inc., for directions with respect to the investment of the funds held by the plaintiff pursuant to the order entered by this court on June 15, 1976, and it appearing to the court that the present investment of such funds matures on July 13, 1976 and the court being fully advised in the premises, it is therefore

ORDERED AND ADJUDGED THAT:

1. The plaintiff, Eckerd's of College Park, Inc., is hereby authorized and directed to withdraw the aforesaid funds immediately upon maturity of the existing investment and to transfer and deliver the entire fund including all interest and earnings thereon forthwith to the Clerk of the Circuit Court of Seminole County.

2. The Clerk of the Circuit Court is hereby authorized and directed, immediately upon receipt of said funds to

deposit the same in an assignable interest bearing account at the highest interest obtainable by bid for a term not to exceed 90 days, subject to further order of this court.

3. Upon transfer of the funds to and receipt therefor by the Clerk of the Circuit Court, the plaintiff, Eckerd's of College Park, Inc., shall be relieved and discharged from further obligation or liability arising out of the custody and investment of such funds.

4. The court reserves ruling over the issue of whether the interest earned on the fund invested by the Clerk of the Circuit Court shall accrue to the benefit of the Clerk's office or to the benefit of the creditors of Webb's Fabulous Pharmacies, and the transfer to and investment by the Clerk of the Circuit Court shall be wholly without prejudice to the claim of the creditors to the earnings from the invested funds and the Clerk of the Circuit Court shall not, by reason of the receipt of said funds or the earnings thereon, have any greater claim thereto than before such receipt.

DONE AND ORDERED in Chambers at Sanford, Seminole County, Florida, this 12th day of July, 1976.

/s/ D.J. Salfi
Circuit Judge

Copies to all parties.